TABLE OF CONTENTS

PAGE

Method of Weighing 2

The Measuring Stick 4

Inconsistent Action 6

Prior Decision of the Commission Proves the Orders Here Are Unlawful 7

Certificate of Counsel 13

Certificate of Service 14

STATUTES CITED

Title 49, United States Code Annotated Sections

1 3

2 3

3 ..... 3, 9, 11

4 3

15 (1) 2, 4, 6, 7, 8, 12

CASES CITED

Class Rate Investigation, 1939

262 I. C. C. 447 ..... 2, 4, 5, 8, 9, 10, 11, 12, 13

264 I. C. C. 41 ..... 2, 7, 8, 10, 11

Eastern Class Rate Investigation, 164 I. C. C. 314 5

North Carolina Corp. Commission v. *A. C. & Y. R. R.*, 213 I. C. C. 259 5

Rail Traffic Between the North and the South, 273 I. C. C. 33 ..... 2, 6, 9, 10, 13

IN THE

Supreme Court of the United States

October Term, 1949

Case No. 363

LYNCHBURG TRAFFIC BUREAU,

PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,

DEFENDANTS-APPELLEES.

PETITION OF APPELLANT FOR REHEARING OF THIS PROCEEDING.

Comes now appellant in this proceeding, with humility, and respectfully beseeches this Honorable Court to grant a rehearing in this proceeding and to give us the privilege of further showing to this Court that the relief we seek should be granted because the orders of the Commission, we think, are contrary to law. The *per curiam* opinion indicates to us that we did not make our proposition clear and, since it is our desire for this Court to fully understand our proposition so the Court can relieve us of the burden cast upon us by the orders of the Commission in the considered proceedings, we are constrained, therefore, to humbly petition this Court for redress of our grievances. A comparison of what the Commission found

lawful in this proceeding with what the Commission found lawful in *Class Rate Investigation*, 1939, 262 I. C. C. 447 anw 264 I. C. C. 41 will show, we believe, that the relief we seek should be granted. The Commission, in *Class Rate Investigation*, 1939, 262 I. C. C. 447 and 264 I. C. C. 41, found that it is *lawful, just* and *reasonable* to charge Danville a first class rate of 137 cents and Lynchburg a first class rate of 128 cents to and from New York and that it is unlawful to charge equal rates at Danville and Lynchburg but the decision in this proceeding (273 I. C. C. 33) holds the contrary to be true, that it is just and reasonable to charge equal rates at Danville and Lynchburg to and from New York. Therefore, we are forced to ask this Court to rehear this proceeding for the purpose, among others, of determining, after rehearing, whether or not Section 15 (1) of the Act or any other provision of the Act, sustains and supports the orders of the Commission in this proceeding. If the Commission has the powers appellees claim, and the Court on rehearing so holds, the business interests of this city will then know exactly what to do. We shall now proceed to enlarge upon this subject with the hope that we will now make clear our proposition and that the desired relief will be given us.

METHOD OF WEIGHING.

When we purchase or sell gems, precious metals, and drugs, we know that we will receive and that we must give 12 ounces in each pound and we know when we purchase or sell all other commodities that we must receive and that we must give 16 ounces in each pound. Therefore, if you live in Chicago, Illinois, New York, N. Y., Danville, Virginia, or Lynchburg, Virginia, you know that 12 ounces are one pound of gems, precious metals and drugs and that 16 ounces are one pound of all other commodities. We know that these things are true because we are taught in school that the system of weight used all over America in weighing commodities is that 12 ounces make one pound of gems, precious metals and drugs, and that 16 ounces make one pound of all other commodities. Consequently, there is never any doubt about what is meant by one pound of gems, precious metals and drugs or by one pound of any of the other commodities. Nor should there

BLEED THROUGH—POOR COPY

be any doubt about how to tell whether or not a charge is reasonable, just, and lawful because Congress declared in the Interstate Commerce Act that all charges for service rendered or to be rendered in the transportation of property shall be, all over America, just and reasonable, that all unjust discrimination is unlawful, that all undue preference or undue prejudice is unlawful, and that it is unlawful to charge more for a shorter haul than for a longer haul (49 USCA 1 (5) (a), 2, 3, 4). Therefore, what are just, reasonable and otherwise lawful charges at Lynchburg, Danville, or at any other place, for transportation service must be measured by the same measuring stick, regardless of whether the destination or origin is Lynchburg, Danville, or elsewhere. Because Congress actually meant that the same system of weights must be used in weighing the lawfulness of the charges for transportation service at Lynchburg as the system used in weighing the lawfulness of the charges at Danville, New York, or elsewhere. Consequently, Congress did not mean that Lynchburg should be required to purchase transportation service on the basis of 12 ounces to the pound and that Danville, New York, Chicago, or other points, should be permitted to purchase the same commodity—transportation service—on the basis of 16 ounces to the pound. Congress actually meant that the same system of weights must be used in weighing the lawfulness of the charges for transportation service at Lynchburg as the system used in weighing the charges at Danville and that all peoples, cities, states, and communities are entitled to equal protection of the law and *to a uniform system of weighing transportation charges,* so even the most humble citizen can determine whether or not the charges are lawful.

The provisions of Sections 1, 2, 3, and 4 of the Act (49 USCA) dealing with the lawfulness of charges for transportation service do not provide that one system of weights can be used in weighing the lawfulness of charges for transportation service at Danville and another system used at Lynchburg. The law makes no exceptions for any person, place or time, as the law declares that all charges for transportation service for all *peoples, places and commodities* shall be just, reasonable, and lawful. Therefore, no exception should be made in weighing the charges for transportation service to

Lynchburg or Danville, and if no exceptions are used, then Lynchburg, under the law, is entitled to purchase transportation service upon the same system of weights as the system of weights used in weighing the lawfulness of the charges for transportation service to Danville or any other place. The Commission, under the purported authority of Section 15 (1) of the Act, has used one system in weighing the charges at Lynchburg and another system in weighing the charges at Danville, which unequal treatment causes us to come back to this Honorable Court for relief.

It is our opinion of the law that the Commission must use 16 ounces or 12 ounces to the pound at Lynchburg, Danville or elsewhere and that a pound of transportation service is not lawfully 12 ounces at Lynchburg and 16 ounces at Danville or elsewhere. Consequently, since the report and orders of the Commission here considered give Danville 16 ounces and Lynchburg 12 ounces to the pound, those orders are *per se* unlawful. The orders of the Commission here considered are not unlawful because we claim they are unlawful, but because the Commission holds that *unequal* treatment of Lynchburg and Danville is unlawful. (See 262 I. C. C. 447.) Therefore, for the reasons herein assigned, this proceeding should be reheard.

THE MEASURING STICK.

We have claimed that holding the rate to Lynchburg as the minimum rate at Danville is actually giving Lynchburg only 12 ounces of transportation service for one pound and actually giving Danville 16 ounces of transportation service for a pound. Our contention that a uniform measuring stick is proper is adequately supported by decisions of the Commission in which decisions the Commission is *measuring* or *weighing* transportation service and fixing the charge therefor based solely upon *shortline distance* between the origin and destination. Applying that measuring stick—distance—in determining the charge to Danville and Lynchburg, we come up with a rate of 120 cents on shoes between New York and Danville and 111 cents between New York and Lynchburg. But applying the method the Commission used in this proceeding, we come up with a rate of 111 cents at Danville and 111 cents at Lynchburg to and from New York. The Commission

BLEED THROUGH—POOR COPY

condemned the method it used in this proceeding because the Commission, in fixing class rates at Danville and at Lynchburg to and from points in Official territory, including New York, at page 701 of 262 I. C. C. 447, *Class Rate Investigation*, 1939, said:

> "The rates herein prescribed are to be applied *to the distance* over the shortest possible rail routes by which carload traffic can be interchanged between carriers without transfer of lading." (Emphasis supplied.)

That system of weighing transportation service (using the *distance* over the shortest rail routes) was employed by the Commission in *Eastern Class Rate Investigation*, 164 I. C. C. 314, and in that proceeding, the Commission prescribed a first class rate of 111 cents between New York and Lynchburg for "rate-making distance of 400 to 420 miles" and that same system was used in *North Carolina Corporation Commission* v. *A. C. & Y.*, 213 I.C.C. 259, where the Commission prescribed a first class rate of 120 cents between New York and Danville for "rate-making distance of 460 to 480 miles."

Then, in *Class Rate Investigation*, 1939, 262 I.C.C. 447, the Commission prescribed for application between points in Official territory, including New York and Lynchburg, and between points in Official territory, including New York and points in Southern territory, including Danville, a mileage scale of class rates, as shown in Appendix 10 of 262 I.C.C. 447 (766) and for the rate-making distance between New York and Danville of 460 to 480 miles, the Commission fixed a first class rate of 137 cents and 128 cents between New York and Lynchburg for rate-making distance of 400 to 420 miles. These three decisions conclusively prove that Danville and Lynchburg are never entitled to equal rates, such as the Commission has approved in this proceeding, to and from points in Official territory, as the difference in *distance* is such that it is impossible to prescribe equal rates to both points without creating unlawful rates at one or the other point—hence minimum rates are unlawful when measured by the formula the Commission fixed to determine lawful rates at Danville and Lynchburg.

INCONSISTENT ACTION

We are here complaining because the Commission in the proceeding here considered, 273 I.C.C. 33, has given Lynchburg only 12 ounces for one pound of transportation service and has given Danville and other points in Southern territory 16 ounces for one pound of transportation service. It is claimed that Section 15 (1) of the Act (49 USCA 15 (1)) will permit the Commission to give Lynchburg only 12 ounces of transportation service for one pound and to give Danville 16 ounces of transportation service for one pound. For years prior to September 1, 1940, the date the rail carriers reduced the Classification ratings on 3500 Classification items, Lynchburg, on those 3500 items, was given 16 ounces of transportation service for one pound and Danville was given 16 ounces of transportation service for one pound, as the Classification ratings on each article to both Lynchburg and Danville were the same and the rates to Danville were made upon the distance to Danville and the rates to Lynchburg were made upon the distance to Lynchburg. However, the Commission, in this proceeding, is permitting the carriers to disregard unity in Classification ratings at Danville and Lynchburg and to disregard the system (the only equitable one) of using the distance from origin to destination in weighing transportation service. The ends of justice, from where we sit, are not being met by disregarding unity in Classification ratings and by not using the distance from origin to destination in determining rates. The Commission is permitting Danville to purchase transportation service based upon a rate determined by using the distance to Lynchburg rather than by using the distance to Danville, which method of unequal treatment of Lynchburg and Danville results in a first class rate of 111 cents at Danville instead of a rate of 120 cents but the Commission is requiring Lynchburg to purchase transportation service based upon the distance to and from Lynchburg and New York, resulting in a first class rate of 111 cents. Therefore, it is obvious that Lynchburg is not receiving 16 ounces of transportation service in each pound if Danville is receiving 16 ounces of transportation service for a pound.

BLEED THROUGH—POOR COPY

PRIOR DECISION OF THE COMMISSION PROVES THE ORDERS HERE ARE UNLAWFUL

The favoritism and undue preference and prejudice created by giving Lynchburg only 12 ounces of transportation service for one pound and giving Danville 16 ounces of transportation service for one pound, cannot be sustained under the provisions of Section 15 (1) of the Act (49 USCA 15 (1)) as that section and paragraph refer to *level of rates* (maximum or minimum or maximum and minimum level of rates) rather than referring to the right of the Commission to group Danville and Lynchburg so as to give Danville 16 ounces of transportation service for one pound and Lynchburg only 12 ounces for a pound. The orders of the Commission in the proceeding here under consideration, since they hold the rate to Lynchburg as the minimum rate at Danville, create unjust discrimination, undue preference and prejudice because holding the rate to Lynchburg as the minimum rate at Danville gives Danville 16 ounces of transportation service for a pound and gives Lynchburg only 12 ounces of transportation service for a pound. This conclusion is true, as Danville gets 464 miles of transportation service for 111 cents, when, for that distance, the rate should be 120 cents, and Lynchburg only gets 401 miles of transportation service for 111 cents, which is the prescribed rate for that distance. Our contention that Section 15 (1) authorizes maximum or minimum or maximum and minimum *level of rates* rather than being authority for the grouping of Lynchburg and Danville into one group, is affirmed by the Commission in *Class Rate Investigation*, 1939, 264 I.C.C. 41, where at page 61, the Commission said:

> "In requiring an increase in rates to remove unlawfulness we are not required first to find that existing rates, or proposed reduced rates initiated by carriers, are not compensatory. See *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609. We found in that proceeding that certain proposed reduced rates were compensatory, considering all costs, but that they were below a *minimum reasonable level* and hence unlawful. The order in that proceeding was sustained in *Scandrett* v.

United States, 32 Fed. Supp. 995, and the judgment was affirmed by the United States Supreme Court in 312 U. S. 661. See also *Jefferson Island Salt Mining Co.* v. *United States*, 6 Fed. (2d) 315." (Emphasis supplied).

Section 15 (1) of the Act (49 USCA 15 (1)) can only be used to remove unlawful charges but never used for the purpose of creating, *for the first time or at any time, unlawful charges*. Consequently, inasmuch as unlawful charges are created by the proceeding here considered in that Danville receives 16 ounces of transportation service for one pound and Lynchburg receives only 12 ounces of transportation service for one pound, the orders must be set aside as they are contrary to the reports of the Commission in 262 I.C.C. 447 and 264 I.C.C. 41.

There can be no question about the unlawfulness of the minimum rates the Commission prescribed in the proceeding here considered and that the use of those minimum charges is unlawful, as the unlawfulness of those minimum rates has been made crystal clear by the Commission in *Class Rate Investigation*, 1939, 262 I.C.C. 447. At page 509 of 262 I.C.C. 447, the Commission said:

> "Upon the record, therefore, we find: (1) That the present Official, Illinois, Southern, and Western Classifications, insofar as the ratings named therein are concerned, as a whole, are, and for the future will be unjust and unreasonable in violation of Section 1(4) and (6) of the Act; and (2) That the several Classifications named in finding 1, insofar as the ratings therein are concerned, as a whole, *because of the substantial number of differences in such ratings that now exist result and will result in the future, in undue and unreasonable preference, advantage, prejudice, and disadvantage as between shippers and receivers of freight in interstate commerce and as between territories in violation of Section 3 (1) of the Act.*" (Emphasis supplied.)

Here, in the quoted provisions of 262 I.C.C. 447, the Commission has found that the differences in Classification ratings between the ratings applicable on traffic moving to Lynchburg and the rating applicable on the same traffic moving to Dan-

BLEED THROUGH—POOR COPY

ville result and will result in the future in undue and unreasonable preference, advantage, prejudice and disadvantage as between shippers and receivers of freight in interstate commerce (Lynchburg and Danville) and as between territories (Official and Southern) in violation of Sections 3 (1) of the Act. Now the difference in the Classification rating at Lynchburg and at Danville is the only reason for minimum rates and that statement is true because in *Minimum Rates on Rail Traffic Between the North and the South,* 273 I.C.C. 33 (the proceeding we are here considering), at page 41 thereof, the Commission said:

> "A comparison of rates under the proposed adjustment between representative points in central and southern territories shows that, class for class, no difficulties are experienced with the proposed hold points but *when comparing so-called mismatched classes, for example, third class in southern and first or second class in official, minimum charges on less-than-carload and any-quantity traffic, as well as on carload traffic, are necessary.*" (Emphasis supplied).

The *existence of mismatched classes,* for example, first class on clothing from New York to Lynchburg and third class on clothing from New York to Danville, was condemned by the Commission as being unlawful at page 509 of 262 I.C.C. 447, *Class Rate Investigation,* 1939, and in that proceeding, the Commission directed the carriers to bring about unity in Classification ratings. But, in this proceeding, (273 I.C.C. 33) the Commission has authorized the carriers to maintain *mismatched classes,* that is third class on clothing moving to Danville and first class on clothing moving to Lynchburg, the kind of mismatched classes the Commission found unlawful in 262 I.C.C. 447 (509) and for the purpose of continuing in effect mismatched classes, the Commission has authorized the carriers to apply the rates to Lynchburg as the minimum rates at Danville, thus giving Danville 16 ounces of transportation service for one pound and giving Lynchburg only 12 ounces of transportation service for one pound. The decision in this proceeding (273 I.C.C. 33) is unlawful or else the decision in 262 I.C.C. 447 is unlawful, as they both cannot be correct because they are in conflict with each other. This

Honorable Court should rehear the proceeding and remove the conflict that exists in 262 I.C.C. 447 and 273 I.C.C. 33.

Not only are the report and orders in the proceeding here considered (273 I.C.C. 33) unlawful because they sanction and authorize the maintenance of mismatched classes, contrary to the finding of unlawfulness made by the Commission in 262 I.C.C. 447 (509) but they are also unlawful because they authorize the application of the rates to Lynchburg as the minimum rates at Danville, which rates to Lynchburg the Commission has found to be unlawful (264 I.C.C. 41). The fact that the rates to Lynchburg are to be applied at Danville as the minimum rates at Danville conclusively shows that the report and orders in this proceeding (273 I.C.C. 33) are unlawful because the Commission, in speaking of the rates to and from Lynchburg and points in Official territory, at page 62 or 264 I.C.C. 41, *Class Rate Investigation*, said:

> "We are convinced from the evidence in these proceedings that the present class rates within official and Illinois territories are below a just and reasonable level and should be increased as a part of the adjustment, to remove the unlawfulness in such rates, in respect of both their unreasonably low level and their unduly preferential character. We are of the opinion that our findings as to those rates are sufficiently stated in the prior report, but to remove any doubt, we find that the class rates within official and Illinois territories are less than just and reasonable rates, with the exceptions as stated in the prior report and in this report, and therefore, unlawful, as well as unlawful because of their unduly preferential character, as more fully stated in the prior report."

Notwithstanding the fact that the Commission found unlawful the disunity in Classification ratings to Danville and Lynchburg, and the class rates to Lynchburg, nevertheless, the Commission, in this proceeding, 273 I.C.C. 33, at page 43, said:

> "We find: 2. That proposed minimum less-than-carload and any-quantity class rates for application on interterritorial traffic between southern and official territories are just and reasonable *."

Now, how can the Commission lawfully hold that the rates to Lynchburg are just and reasonable minimum rates at Danville when the Commission found that the rates to Lynchburg are unlawful (262 I.C.C. 447 and 264 I.C.C. 41), and if those rates are unlawful at Lynchburg, by what method of reasoning can those rates be made reasonable and just at Danville? Then, too, how can the Commission hold mismatched classes reasonable and just in this proceeding and hold mismatched classes unlawful in 262 I.C.C. 447, (509), *Class Rate Investigation,* 1939?

Prior to September 1, 1940, Lynchburg and Danville, on 3500 Classification items, were receiving 16 ounces of transportation service for one pound as to the level of rates and uniformity in ratings, but effective on that date, the rail carriers, with the blessings of the Commission, reduced the Classification ratings on 3500 Classification items on traffic moving between points in Official territory and points in Southern territory. The effect of the reduced Classification ratings was, as an example, to reduce the rate on shoes, clothing, etc., from first class of 120 cents to third class of 84 cents between New York and Danville and to continue in effect the first class rate on shoes, clothing, etc., of 111 cents between New York and Lynchburg. Therefore, since Danville is 64 miles south of Lynchburg and since the 84 cent rate is lower than the 111 cent rate to Lynchburg, unlawful rates were created and that unlawfulness is sought to be corrected by minimum rates but giving equal rates to Danville and Lynchburg when equal rates are not proper to Danville and Lynchburg, only continues unlawful rates in effect and adds to the upset. Consequently, since Lynchburg, prior to September 1, 1940, had a rate of 111 cents and Danville had a rate of 120 cents, the establishment of a rate of 84 cents at Danville created undue preference and prejudice and holding the rate to Lynchburg as the minimum rate at Danville only continues unlawful rates. The Commission found, at page 509 of 262 I.C.C. 447 that such mismatched classes result in undue and unreasonable preference, advantage, prejudice and disadvantage as between shippers and receivers of freight in interstate commerce (Lynchburg and Danville) and as between Classification territories (Official and Southern) in violation of Section 3 (1) of the

Act. Therefore, since minimum charges have been used to continue in effect disunity or the lack of uniformity in Classification ratings on traffic moving to Lynchburg and Danville to and from points in Official territory, and since the Commission has ruled that disunity or the lack of uniformity in Classification ratings results in undue preference and prejudice between shippers and receivers of freight (Lynchburg and Danville) and between Classification territories (Official and Southern), the report and orders of the Commission here considered establish unlawful charges. Now the authority of the Commission under Section 15 (1) of the Act permits the Commission to prescribe maximum or minimum or maximum and minimum charges only when unlawful charges are found to exist, but *that authority is not to be used to create, establish, or continue in effect unlawful charges.* Consequently, since disunity in Classification ratings existing between Lynchburg and Danville is unlawful and so found by the Commission and, since minimum charges are used to create, establish and continue undue preference and prejudice, those charges are unlawful and those charges cannot be established under the provisions of Section 15 (1) of the Act (49 USCA 15 (1)).

The maintenance of a third class Classification rating on clothing, as an example of many commodities, resulting in a rate of 84 cents on shipments moving between New York and Danville and the maintenance of a first class Classification rating on clothing, resulting in a rate of 111 cents on shipments moving between New York and Lynchburg, results in undue preference and prejudice to shippers and receivers at Danville and Lynchburg and between Official territory and Southern territory, as the Commission has found that such unequal Classification ratings at Lynchburg and Danville are unlawful (see 262 I. C. C. 447 (509)). Consequently, that finding of undue preference and prejudice conclusively proves, as a matter of law, that the orders of the Commission in this proceeding are unlawful as those orders permit the carriers to continue in effect unequal Classification ratings, ratings that the Commission has found to be unlawful. Therefore, since unequal Classification ratings are unlawful, the orders of the Commission in this proceeding must fail, as Section 15 (1) of

BLEED THROUGH—POOR COPY

the Act permits unlawful charges to be removed but that authority cannot be used to create and continue in effect ratings and charges the Commission found unlawful. The unequal Classification ratings to Danville and Lynchburg, which unequal ratings have caused the establishment of minimum charges, cannot be *unlawful* in *Class Rate Investigation,* 1939, 262 I.C.C. 447 (509) and still be *lawful and just* in this proceeding (273 I.C.C. 33). Therefore, one or the other of these decisions of the Commission is wrong and for that reason, among others, this Honorable Court should grant a rehearing as prayed. There is no authority, in law, to support, or sustain the orders issued by the Interstate Commerce Commission in the proceeding here considered. But, unless this Honorable Court grants our prayer for rehearing and then reverses the orders, a great injustice will be done. We think that justice requires a rehearing and we know the burden should be removed.

Respectfully submitted,

LYNCHBURG TRAFFIC BUREAU

By: W. G. BURNETTE,
Counsel.

1104-5 Peoples National Bank Building
Lynchburg, Virginia
November 30, 1949.

CERTIFICATE OF COUNSEL

This is to certify that this petition for rehearing is filed in good faith and not for delay and that the petition is restricted to the grounds available to petitioner but not previously presented.

W. G. BURNETTE.

CERTIFICATE OF SERVICE

This is to certify that I, W. G. Burnette, Counsel for the Lynchburg Traffic Bureau, have served a copy of the petition for rehearing of Case No. 363, upon: Gerald L. Phelps, Esquire, Phillip B. Perlman, Esquire, Edward Dumbauld, Esquire, and Herbert A. Bergson, Esquire, Department of Justice, Washington, D. C.; Daniel W. Knowlton, Esquire, and J. Stanley Payne, Esquire, Interstate Commerce Commission, Washington, D. C.; Howard C. Gilmer, Esquire, United States Attorney, Roanoke, Virginia; D. Lynch Younger, Esquire, Norfolk and Western Railway Company, Roanoke, Virginia; Paul V. Miller, Esquire, Pennsylvania Railroad Company, Philadelphia, Pennsylvania; and Frank H. Cole, Esquire, Baltimore and Ohio Railroad Company, Cincinnati, Ohio, by mailing to each said party at the named address, by United States Registered Mail, a copy thereof properly addressed, with prepaid postage.

Proof of service of the petition for rehearing is filed with the Clerk of the Supreme Court of the United States (see registered mail receipt attached to the original petition filed with the Clerk).

Dated at Lynchburg, Virginia, this 30th day of November, 1949, and served on this date.

W. G. BURNETTE.

1104-5 Peoples National Bank Building
Lynchburg, Virginia
November 30, 1949.

BLEED THROUGH—POOR COPY